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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. JAMES MICHAEL STONE, Defendant and Appellant.	C078779 (Super. Ct. No. 62115828)

Defendant James Michael Stone was alleged to have molested two young girls (one his daughter), by inappropriately touching both girls and kissing one. A jury found him guilty of three counts of lewd and lascivious conduct on a child under 14 years of age (Pen. Code, § 288, subd. (a))[1] and found true a multiple victim enhancement (§ 667.61, subd. (c)). The trial court found true allegations that defendant had a serious

[1] Further undesignated statutory references are to the Penal Code.

felony prior (§ 667, subd. (a)(1)), a strike prior (§ 667, subd. (b)-(i) & 1170.12, subd. (a)-(d)), and a prior sex offense (§ 667.61, subd. (d)(1)). After denying a motion for a new trial, the court sentenced defendant to 155 years to life in prison.

On appeal, defendant contends it was error to admit the Multi-Disciplinary Interview Center (MDIC) interview of Jane Doe No. 2 (J.D.), his daughter, because by declining to answer any relevant questions on cross-examination she failed to "testify" as required by Evidence Code section 1360. He argues this complete failure to respond to his questions regarding her (previously made) accusations denied him his right to confrontation. He further contends he received ineffective assistance of counsel because trial counsel failed to challenge the admission of child pornography on his cell phone. In a supplemental brief, defendant contends the case must be remanded to the trial court for the exercise of discretion to dismiss the five-year prior enhancement (§ 667, subd. (a)(1)) as now permitted by Senate Bill No. 1393. Defendant appealed in March 2015; his briefing was initially completed in March 2016 (with supplemental briefing ordered later), and the panel as presently constituted was assigned to the case in November 2018.

We find merit in defendant's first and last contentions. Because J.D. refused to answer *any* questions at trial relating to her claims against her father, admitted into evidence by way of other sources, she did not "testify" as required by Evidence Code section 1360. Consequently, it was error to admit her MDIC interview. Its admission denied defendant his constitutional right to confrontation; he was not able to cross-examine J.D. about the damaging allegations she made about him to others but expressly denied on the stand and then refused to discuss further, instead giving nonresponsive and at times fantastical answers to questions.

Because the admission of the MDIC interview prejudiced defendant, we shall reverse the affected count and otherwise affirm.

The People concede defendant's third contention, that remand is required for the exercise of discretion to dismiss the five-year prior. We agree and remand for that purpose.

FACTS

Molestation of Jane Doe No. 1

On New Year's Day 2012, defendant was visiting his sister, her husband, and their son. Also present was a friend and her eight-year-old daughter, Jane Doe No. 1.[2] Defendant was cooking breakfast and Jane Doe No. 1 was watching him. Defendant touched her on her private part over her clothes.[3] She ran away. Later that day defendant called to her and led her to a bedroom where he tried to kiss her. He put his tongue in her mouth, which she found to be "gross." After her mother returned from taking defendant home, Jane Doe No. 1 told her mother what had happened.

Jane Doe No. 1's mother sent defendant a text message a few days later. She told him he was a "sick fuck" and that her daughter "told me." Defendant responded, "Oh, that I touched her? I didn't mean to, and I told her I was sorry. Really, I didn't mean to." Defendant sent the message, "I really feel like crap. I really didn't mean to." "I told her I was sorry and I didn't mean to. I didn't know I made her feel bad about it. I'm so sorry." He sent several text messages that asked her not to hate him and to say something. The mother responded, "How do you not mean to?" Defendant replied, "We were goofing around and it happened. I would never intentionally want to make her feel weird around me." "I feel like a dirty bastard." When the mother did not respond, defendant asked her

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[2] Pursuant to section 293.5, the trial court granted the motion to refer to the victims as Jane Doe No. 1 and Jane Doe No. 2.

[3] At trial, Jane Doe No. 1 testified defendant touched her vagina. In the MDIC interview she said he touched her butt and grabbed her hand and made her touch and rub his penis, which she described as his "middle part" that he uses to pee.

to talk to him. The mother declined to do so. A few months later, she called the police because she was concerned defendant might be touching other children.

Molestation of Jane Doe No. 2 (J.D.)

D.S. was married to defendant and has two children with him. They had separated many times and by the time of trial had not lived together for a few years. In July 2012 the children stayed with defendant a few times. On August 8, 2012, D.S. learned that defendant had been arrested for child molestation. She spoke to her four-year-old daughter J.D. about good and bad touches and asked if Daddy had ever touched her or hurt her. J.D. said yes. After further questioning, J.D. said, "Daddy touched my 'gina' and it hurt."

D.S. made an appointment with J.D.'s doctor. The pediatrician examined J.D. the next day. He asked her if anyone had touched her in a bad way and she said yes. She said Daddy touched her and it hurt. She indicated he touched her vagina. The doctor examined her genitals and found no trauma.

J.D. told a social worker from Child Protection Services that her father touched her "down there" and pointed to her vagina.

At the MDIC interview, the video of which was played at trial, J.D. said her father was touching her "gina" and it hurts. She said it occurred at defendant's sister's house. She said it was scary like a movie and refused to tell more because "it's just a bad thing." "It's kinda spooky." After a break, J.D. said her younger brother stopped daddy and "saved me." She said her father "dicked me." She said that meant weird things. "It's so scary. It's like Daddy won't stop." She said he stuck her with his "peanut" and "wiggled me," demonstrating hip thrusts. She said defendant did not say anything, but she said stop; she wanted him to stop his "peanut" which jiggled, "Like he was already popped." She drew a picture of defendant "dicking her." "He said, I'm gonna dick you." J.D. said what happened at her aunt's house was "daddy's fault." "He would just do it again." He would do it after she said stop.

J.D. as a Trial Witness

We discuss J.D.'s statements as a witness at trial in detail, as the attempt to secure her trial testimony is the subject of a claim on appeal, which we discuss *post*.

At trial, the prosecutor first asked J.D. a series of preliminary questions such as her age, birthday, and grade in school, and she readily answered those questions. She then was asked if she remembered talking to a doctor about being hurt. She replied: "I was hurt a long time ago. Like, we were living at this little house with [grandma]. It was a beautiful house. So -- there was bugs and icky stuff. So we had to move to [grandma and grandpa's] place." After readback for the defense attorney, the prosecutor asked J.D: "Do you know the parts of your body that no one is supposed to touch?" and J.D. answered, "I -- nobody -- nobody has. I have been hugging people and doing stuff like -- " When interrupted and asked again, "Are there parts of your body that no one is supposed to touch?" she responded "No."

She then refused to answer if she knew "the part on your body where you go pee," stating, "I don't want to tell you . . . because I don't want to" and "I don't want to say because I don't want to right now." The prosecutor then asked her: "Has anyone ever touched you on your private part?" to which J.D. responded "No." The prosecutor's final question on direct was, "Has anyone ever hurt you on your private part"; the answer was "No."

The defense then tried to cross-examine. Counsel began by asking if J.D knew "what private part means" to which she responded, "I don't want to tell you because it's -- I don't want to tell you because I don't want to." Counsel then asked her "[w]hat happened" when she "got hurt a long time ago" and she answered, "We had to look at my part, and it -- it -- I don't know what to -- I don't know -- I don't want to tell you, not about it." Counsel tried to clarify, asking: "If I asked you any question about your body, would you answer me?" J.D. responded "Yes." However, to counsel's next question, "Has anyone ever touched you on the arm?" she responded "No." She said she wouldn't

answer his questions "because it's going to sound funny" and "I don't want to tell you it." Defense counsel stopped his cross.

After a break, the prosecutor attempted redirect examination on J.D. J.D. reiterated that the proceedings were "funny" and that she would not answer questions because "it was going to be funny"; when asked if she recognized her father (sitting at the defense table) she said: "I don't know who . . . that man is."

The prosecutor asked J.D. what part her body she "went pee with"; this time J.D. responded, "My little privates." In response to the prosecutor's next (and final) questions "Has anyone ever touched your [privates]?" and "Has anyone ever hurt your [privates]?" J.D. said "No." J.D. then spontaneously added, "It's funny because it is true."

Defense counsel rose for re-cross-examination and again tried to ask J.D. about her previous claims against her father. Counsel first asked, "have you ever talked to anyone about being touched in a private area of your body"; J.D. answered "No." To his question "Have you ever talked to a doctor about anything like that?" she responded "Umm, no." She denied that she had talked to anyone other than her mother about "being touched on a private area," as defense counsel characterized it.

Counsel then asked her the name of her school, and she said she did not know. Counsel asked her when she said "that you didn't want to say things that would sound funny" "what kind of things were you talking about" and she answered "I didn't want to tell them because they're going to . . . sound weird" and "I don't like telling people about that because it will sound funny, and I don't want to tell it because it is going to afraid [*sic*] me." She then continued in a nonresponsive narrative to discuss how she would "move apart with 'Funa' and be -- I am not going to be with 'Funa' again. You know, that is my best friend. [¶] I always -- we went trick or treating with her. We always went trick or treating. I was princess [¶] . . . [¶] and Juliette came up, and we saw a flashlight, so Juliette was an elephant." Defense counsel tried again to ask, "what kinds of things do you not want to talk about" and "what are the things that you don't want to

answer questions about"; J.D. responded that "They would not go -- they would not -- I don't want to -- I don't want to talk about it because I don't want anybody getting weird or . . . getting worried about something or . . . something funny about everything. . . . I don't know what's going to be the matter with my friends or the matter with my house and my family." Defense counsel finally asked, "Are you able to explain to us what it is that you do not want to talk about?" and J.D. answered "I don't want to talk about it. It's just -- I just want to talk about something nice, about not a -- to -- the people going to -- I don't want to talk about them, because it will not understand them." No more questions were asked of J.D. at trial.

Propensity Evidence

As propensity evidence, the People introduced evidence of defendant's prior convictions and pictures of child pornography on his phone. In 2002 defendant was convicted of three misdemeanor counts of annoying or molesting a child. (§ 647.6, subd. (a).) In 2000 he was convicted of committing a lewd and lascivious act on a child under the age of 14. The police downloaded 25 images of child pornography from defendant's cell phone.

The Defense

The defense offered the testimony of defendant's sister and her husband that they did not observe any inappropriate behavior by defendant on New Year's Day, and that Jane Doe No. 1 did not appear upset and did not avoid defendant that day. Three character witnesses testified they had never observed defendant behave inappropriately around their children and they trusted him. There was evidence that Jane Doe No. 1 sometimes lied.

Defendant testified he touched Jane Doe No. 1 below the waist while he was tickling her. When she said, "don't," he stopped. He denied he touched her genitals or buttocks or moved her hand. He testified she followed him down the hall when he went

to take a nap. He told her playtime was over and she was disappointed. She gave him a hug when he left. He denied any inappropriate conduct with J.D.

Defendant denied ever deliberately accessing child pornography; he sometimes downloaded entire files that contained groups of pictures. He had a "game" with friends, exchanging obscene pictures. He looked for "oddities," such as obese men and women in "bitty" thongs.

In rebuttal, a detective testified he reviewed 5,600 images that were downloaded from defendant's phone. None were "oddity" pornography and only one depicted male genitalia.

DISCUSSION

I

Admission of J.D.'s MDIC Interview

Defendant contends the trial court erred in admitting the tape of the MDIC interview of J.D. because she did not "testify," as required by Evidence Code section 1360. Although she took the stand and answered some preliminary and irrelevant questions, she refused to discuss the events at issue, including her previously made accusations against defendant, which were admitted into evidence against him. He contends he was thereby denied his Sixth Amendment right of confrontation.

A. *The Law*

Evidence Code section 1360 provides in part:

> "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:
>
> "(1) The statement is not otherwise admissible by statute or court rule.

> "(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.
>
> "(3) The child either:
>
> "(A) Testifies at the proceedings.
>
> "(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.
>
> "(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement."

In *Crawford v. Washington* (2004) 541 U.S. 36, 47-59, the United States Supreme Court announced the new rule that the admission of "testimonial" hearsay statements against a criminal defendant violates the confrontation clause of the Sixth Amendment if the declarant is unavailable to testify at trial and the defendant had no previous opportunity to cross-examine. *Crawford* applies to testimonial statements admitted under Evidence Code section 1360. (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1398.)

In *Sisavath*, the appellate court found the MDIC interview was testimonial because it was held after the information was filed, a deputy district attorney and an investigator were present, and it was conducted by a specialist. (*People v. Sisavath, supra*, 118 Cal.App.4th at pp. 1402-1403.) Here the interview was conducted after defendant was under arrest for lewd and lascivious conduct, but before the complaint had been amended to add J.D as a victim. The record does not contain information about who was present during the interview. Nonetheless, given the ongoing investigation of defendant and J.D.'s young age, "there is no serious question but that [J.D.'s] statement was ' "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." ' " (*Id.* at p. 1402.) Thus, J.D. was

required to testify or have been available earlier for cross-examination in order to admit the MDIC interview.

B. *Forfeiture*

The People contend defendant has forfeited his confrontation argument because he failed to raise this ground for excluding the MDIC interview below. Under Evidence Code section 353, a verdict shall not be set aside for the erroneous admission of evidence unless an objection was timely made "and so stated as to make clear the specific ground of the objection." (*Id.*, subd. (a).) At trial, defendant objected to the admission of J.D.'s MDIC interview on two grounds. First, he claimed she was not competent under Evidence Code section 701 because she was not willing to tell the whole truth. Second, he objected that she had not testified as required by Evidence Code section 1360. The trial court overruled both objections.

Defendant contends the People's forfeiture argument should be rejected under *People v. Partida* (2005) 37 Cal.4th 428. In *Partida*, defendant objected to the admission of gang evidence under Evidence Code section 352 because it was more prejudicial than probative. On appeal, he contended the asserted error violated his due process rights. Our Supreme Court considered whether the section 352 objection preserved a due process argument on appeal. (*Id.* at p. 433.) The court considered the purposes served by the specific objection requirement. "What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*Id.* at p. 435.)

The court found that defendant could make a narrow due process argument. "He may argue that the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process. Similarly, a defendant may argue that error in overruling a trial objection was prejudicial under the *Watson* test (*People v. Watson* [1946] 46 Cal.2d 818) without citing *Watson* as part of the trial objection. [¶] We recently concluded that, '[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal.' [Citations.]" (*People v. Partida, supra,* 37 Cal.4th at pp. 435-436.)

Here, defendant made clear his objection to admission of J.D.'s MDIC interview was based on her refusal to answer any questions about the events that led to the allegation of lewd and lascivious conduct. Defendant's trial objection called upon the trial court to consider the same facts and a similar legal standard as the confrontation claim he makes on appeal. We find defendant's objection below was sufficient to preserve his confrontation claim on appeal. His appellate claim of violation of confrontation rights "merely restates, under alternative legal principles," his objection at trial. Under *Crawford,* Evidence Code section 1360's requirement that a child victim testify as a prerequisite to admission of the MDIC interview is necessary to avoid a violation of the right to confrontation unless there was a prior opportunity to cross-examine the child. (*Sisavath, supra,* 118 Cal.App.4th at pp. 1398, 1401.)

C. *Merits*

Defendant contends J.D.'s limited responses to some questions at trial do not qualify as "testifying" under Evidence Code section 1360 because she refused to discuss *anything* related to the alleged molestation, including the accusations she had made to

others and why she might have made them given that she denied on the stand that defendant had touched her or hurt her.

We have described J.D.'s testimony in detail *ante*. As the questioning continued, it became apparent that J.D. was refusing to answer any question related to the alleged molestation or her discussions with others about the allegations. When defense counsel asked J.D. if anyone had ever touched her arm, she claimed no one had. She claimed to be unable to recognize her father. She repeatedly told the lawyers she did not want to "talk about it" and when she did respond to questions her responses were non-sequiturs. Finally, she began discussing Halloween costumes and trick or treating until both defense counsel and the prosecutor gave up. Given J.D.'s off-topic or fantasy fueled responses to any question about the allegations, it became clear that further questioning was futile.

Because J.D. took the stand and answered two direct examination questions with the answer "no," the trial court allowed admission of her MDIC interview, in which she spoke extensively about the alleged molestation, and the detailed statements she made to her mother and her doctor that implicated defendant.[4] The People relied on the interview and these statements to prove defendant's guilt. Because J.D. refused to discuss the allegations and her prior statements about them on the stand, defendant had no opportunity to cross-examine her as to the most significant evidence against him.

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[4] J.D.'s statements to her mother, her doctor, and the social worker were admitted as fresh complaints. The trial court instructed the jury on the limited use of a fresh complaint only as to the statement to the social worker and gave the general instruction on the limited use of fresh complaints only as to Jane Doe No. 1. Although J.D. denied defendant had done anything to her when questioned at trial, she was not asked about her earlier statements, presumably because she was refusing to acknowledge or address them. Consequently, her prior accusations do not meet the requirements for admission as prior inconsistent statements. (Evid. Code, §§ 1235, 770.) Nonetheless, without objection, the prosecution used the statements in closing argument to prove defendant's molestation of J.D.

The People contend there was no violation of the right to confrontation because J.D. did not refuse to testify, but rather refused selectively to answer some questions and such selective refusal did not violate the confrontation clause.

"[T]he federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer." *(People v. Carter* (2005) 36 Cal.4th 1114, 1172.) In *People v. Homick* (2012) 55 Cal.4th 816 at page 855, a witness for the prosecution was impeached with prior inconsistent statements after he claimed his previous statements were coerced by the police, asserted a lack of memory, refused to answer questions "and generally behaved in an uncooperative and childish manner." On appeal, defendant asserted the witness's refusal to answer questions on cross-examination violated defendant's confrontation rights. (*Id.* at p. 861.) Our Supreme Court disagreed. "While his refusal to answer defendant's counsel's questions 'narrowed the practical scope of cross-examination, [his] presence at trial as a testifying witness gave the jury the opportunity to assess [his] demeanor and whether any credibility should be given to [his] testimony or [his] prior statements. This was all the constitutional right to confrontation required.' [Citation.]" (*Ibid.*)

There is, however, a significant difference between an adult witness who refuses to answer questions and a child witness who does the same. As explained in *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932 at page 967: "An adult witness's difficult and defiant conduct, such as refusing to answer questions, gives rise to an inference that the testimony the witness does give is not believable. [Citations.] A similar inference does not arise when a child witness has difficulty answering questions. Indeed, a child's reluctance to answer questions, especially about sensitive subjects such as molestation, may *enhance* the child's credibility to the extent it suggests that whatever happened is too traumatic for the child to discuss."

Here, J.D.'s refusal to answer questions about the alleged molestation because it would sound "funny" or "weird" strongly suggested that something traumatic had

happened to her. She only wanted to talk about "something nice." Due to her refusal, defendant was unable to cross-examine her *at all* about what had happened, and unable even to *ask* about J.D.'s previous statements to others about the allegations. It is not merely that the responses were inadequate; J.D. either gave blanket denials or affirmatively refused to respond. When she did engage, it was in a nonresponsive and at times fantastical manner that discouraged further attempts to question her. Thus, defendant was denied "a full and fair opportunity to probe and expose" infirmities in J.D.'s prior accusations against defendant. (*United States v. Owens* (1988) 484 U.S. 554, 558.)

Because J.D. refused to answer any questions about the allegations against defendant, her limited responses while on the witness stand cannot be considered testimony as required by Evidence Code section 1360, and defendant was denied his right to confront her. The trial court erred in admitting her MDIC interview.

D. *Prejudice*

Violations of the right to confrontation are subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18 at page 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) "Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Ibid*.)

The People contend any error in admitting the MDIC interview was harmless because the jury heard testimony from her mother and her doctor that J.D. said defendant touched her vagina and it hurt. There was no evidence suggesting J.D. harbored any ill will toward defendant or had any reason to fabricate her reports of abuse. The People further contend defendant's credibility was harmed by the evidence of the molestation of J.D. and his prior convictions for sex offenses against minors.

The MDIC interview provided the strongest evidence by far that defendant committed a lewd or lascivious act against J.D. The video was the *only* time the jury saw J.D. herself make *any* claim against defendant. And she provided details not otherwise heard by the jury about defendant's "dicking" her and the actions of his "peanut." The interview also provided the only evidence of *where* the conduct occurred. This was by far the most powerful evidence of molestation introduced against defendant, and its admission was error. We cannot say with confidence that the error in admitting the interview was harmless beyond a reasonable doubt. Count three must be reversed.

II

Ineffective Assistance of Counsel

Defendant next contends he was denied effective assistance of counsel because trial counsel failed to challenge the admission of images of child pornography on his cell phone.

A. *Background*

Detective Phelps arrested defendant on August 8, 2012, and seized his cell phone. Police searched the phone incident to arrest; they used a virtual memory dump which does not download the entire memory.[5] At the time, the police were interested in text messages. They found nothing illegal on defendant's phone.

During a jail visit a few days later, D.S. told defendant J.D. had accused him of molesting her. He denied the allegations, but stated the police had taken his phone as evidence. He had sent several e-mails to doctors and defendant declared, "That's evidence against me." When D.S. asked what was in the e-mails, defendant said, "Just

[5] At the time, a warrantless search of a cell phone incident to arrest was authorized by *People v. Diaz* (2011) 51 Cal.4th 84, later overruled by *Riley v. California* (2014) 573 U.S. 373.

what [his sister] told you I said." Detective Phelps took this to mean defendant said something in the e-mail that might tend to incriminate him.

Detective Phelps then prepared a search warrant. He recited the facts set forth above, as well as that defendant had admitted some abuse in text messages and a pretext phone call, and declared his belief that there was sufficient cause that defendant's phone contained evidence that defendant had perpetrated lewd and lascivious acts with a child. The magistrate issued the warrant, authorizing the search of "[a]ny and all emails or other electronic communications, which are stored within the memory of said cell phone, that tend to show that alleged lewd acts with a child occurred." The warrant authorized the seizure of evidence of a felony and evidence "which tends to show that sexual exploitation of a child, in violation of Penal Code Section 311.3, has occurred or is occurring."

In a second forensic examination of defendant's phone, a greater amount of information was extracted. The information was stored on five DVDs. At trial, 25 images of nude underage females were admitted into evidence. The defense did not object to the admission of this evidence.

In a motion for a new trial, defendant claimed his trial counsel was ineffective for failing to move to suppress this evidence. He contended the search of his phone should have been limited to a search of e-mails. At a hearing, defendant's trial counsel testified he did not move to suppress this evidence based on his understanding that under *People v. Diaz, supra*, 51 Cal.4th at page 84, the police could search the cell phone incident to arrest without a warrant.

B. *Analysis*

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably

competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

Defendant contends the affidavit for the search warrant provided probable cause to search his phone only for e-mails, not for child pornography. The warrant allowed the search and seizure of "emails or other electronic communications." Images are a form of communication. (*In re Ryan D.* (2002) 100 Cal.App.4th 854.) Thus, the question is whether the affidavit provided probable cause to search electronic communications other than e-mails.

"It is settled law that the magistrate must make 'a practical, commonsense decision' whether, under all the circumstances described in the affidavit, there is 'a fair probability' that evidence of a crime will be found in a particular place." (*People v. Lee* (2015) 242 Cal.App.4th 161, 175.) "[T]he magistrate's determination will not be overturned unless the supporting affidavit fails as a matter of law to support the finding of probable cause. [Citations.] Doubtful or marginal cases are resolved in favor of upholding the warrant. [Citations.]" (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.)

Detective Phelps's affidavit indicated defendant had admitted some abuse in messages to Jane Doe No. 1's mother and in a pretext phone call. It provided evidence in the form of defendant's own statements that incriminating evidence might be found in e-mails on defendant's phone. Since the affidavit established that incriminating evidence had been or likely could be found in various forms of communication using defendant's phone, the magistrate could reasonably conclude such evidence might be found in other forms of electronic communication. The affidavit provided probable cause for the search warrant.

Defendant's claim of ineffective assistance of counsel fails because he has not shown deficient performance by trial counsel. A challenge to admission of the child pornography on defendant's phone would have failed. "Failure to raise a meritless objection is not ineffective assistance of counsel." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90.)

III

Remand for Resentencing

In a supplemental brief defendant contends this case must be remanded to the trial court to exercise its discretion to strike the five-year prior enhancement (§ 667, subd. (a)) as now permitted by Senate Bill No. 1393. The People concede that remand is appropriate. We agree with the parties.

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the pre-2019 versions of these statutes, the court is required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (§ 667, subd. (a)), and the court has no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b).)

Defendant contends the statutory changes of Senate Bill No. 1393 apply retroactively to any case that is not final on January 1, 2019, under the rule of *In re Estrada* (1965) 63 Cal.2d 740. "The *Estrad*a rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (*People v. Conley* (2016) 63 Cal.4th 646, 657.)

The same inference of retroactivity applies when an amendment ameliorates the possible punishment. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.) When a statutory amendment " 'vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,' " there is "an inference that the Legislature intended retroactive application 'because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.' " (*Ibid.*, quoting *People v. Francis* (1969) 71 Cal.2d 66, 76.)

Under the *Estrada* rule, as applied in *Francis and Lara*, we infer as a matter of statutory construction, that the Legislature intended Senate Bill No. 1393 to apply to all cases not yet final on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Accordingly, we remand the matter to the trial court for the exercise of discretion to dismiss the section 667, subdivision (a) enhancement.

DISPOSITION

Count three, the conviction for lewd or lascivious conduct (§ 288, subd. (a)) against Jane Doe No. 2, and the multiple victim enhancement (§667.61, subd. (e)(4)) are reversed. In all other respects the judgment is affirmed. The matter is remanded to the trial court for the exercise of discretion to dismiss the five-year enhancement of section 667, subdivision (a) and to issue a new abstract of judgment reflecting the reversed counts and enhancements.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Robie, J.